MICHIGAN DEPARTMENT OF COMMUNITY HEALTH

NOTICE OF PROPOSED POLICY

Public Act 280 of 1939, as amended, and consultation guidelines for Medicaid policy provide an opportunity to review proposed changes in Medicaid policies and procedures.

Please review the policy summary and the attached materials that describe the specific changes being proposed. Let us know why you support the change or oppose the change.

Submit your comments to the analyst by the due date specified. Your comments must be received by the due date to be considered for the final policy bulletin.

Thank you for participating in the consultation process.

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Director, Program Policy Division
Bureau of Medicaid Policy and Actuarial Services

Project Number:	0503-HCEP	**Comments Due:**	April 22, 2005	**Proposed Effective Date:**	XX/XX/05

Mail Comments to: Eligibility Policy
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Policy Subject: Medicaid Asset Policy for Annuities

Affected Programs: Medicaid

Distribution: HCEP manual holders

Policy Summary: Defines annuities that would be non-countable for the purpose of qualifying for Medicaid.

Proposed Policy Draft

Michigan Department of Community Health
Medical Services Administration

Distribution:	HCEP manual holders
Issued:	XX/XX/05
Subject:	Medicaid Eligibility Policy
Effective:	June 1, 2005 (proposed)
Programs Affected:	Medicaid

Effective June 1, 2005, the Michigan Department of Community Health (MDCH) will implement Medicaid asset policy to cover annuities. The changes will specifically address annuity policy separately from trust policy. There has been an increase in the use of annuities to artificially impoverish a person in order to qualify for Medicaid long-term care. The proposed annuity policy defines a non-countable annuity asset for the purpose of qualifying for Medicaid.

LEGAL BASIS

Medicaid
1902(a)(10) of the Act
1902(r)(2) of the Act
1902(a)(18) of the Act
1917(d) of the Act
1917(e) of the Act
42 CFR 435.840
42 CFR 435.843
42 CFR 435.845
MCL 400.106, Social Welfare Act

ABW
DCH Appropriations Act

Program(s) Affected:
Medicaid, TMA-Plus

ELIGIBILITY REQUIREMENTS

Some health programs or Medicaid categories require a consideration of a person's trust in determining eligibility. These include Low Income Families (LIF)and SSI-related Medicaid categories.

LIF and SSI-Related Medicaid

How the trust is treated depends on the type of trust and when it was established. The following information explains:

- Medicaid Qualifying Trusts
- Medicaid Trusts
- Miller Trust
- Pooled Trusts, and
- Special Needs Trusts

AVAILABILITY

Other than by will where an individual, the individual's spouse, or anyone acting on behalf of the individual or the individual's spouse establishes a trust using at least some of the individual's funds, the trust is considered available to the individual for purposes of determining Medicaid eligibility.

In determining whether a trust is available, no consideration is given to the purpose of the trust, the trustee’s discretion in administering the trust, use restrictions in the trust, exculpatory clauses, or restrictions on distributions.

An asset is not considered unavailable because it is owned by the trust rather than the person.

MEDICAID (MA) QUALIFYING TRUSTS

Criteria

A Medicaid Qualifying Trust is a trust or a similar legal device:

- Established prior to August 11, 1993.
- Established by an individual whose assets must be considered, or his spouse. A trust established by a person's guardian or legal representative acting on the person's behalf using the person's assets is treated as having been established by the person.
- When the person whose assets must be considered is the beneficiary of all or part of the payments from the trust.
- Where the amount of payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the amount to be distributed to the individual.
- This will include revocable and irrevocable trusts, or trusts for purposes other than to qualify the individual for Medicaid. Trusts for specific purposes, such as irrevocable burial trusts, educational trusts, and medical trusts, could be Medicaid qualifying trusts, provided they meet the criteria.

A trust is not considered a Medicaid Qualifying Trust:

- If the sole beneficiary is a mentally retarded person who resides in an ICF/MR and the trust or initial trust decree was established prior to April 7, 1986.
- If the trust was established by a will.

Policies regarding a Medicaid Qualifying Trust no longer apply when:

- The trust is revoked.
- The full amount of the principal is actually distributed to the individual.

Countable Assets or Income

Medicaid Qualifying Trusts are treated as follows:

- The amount that is deemed available to the beneficiary is the maximum amount that can be distributed to him under the terms of the trust, provided the trustee exercised his full discretion under the terms of the trust.
- The maximum amount deemed available includes only amounts that can be, but are not, distributed from either the income or principal of the trust.
- Amounts that are actually distributed to, or on behalf of, the beneficiary for any purpose are treated as income and/or assets under the rules of the SSI program.
- The maximum distributable amount counts as resources. Trust income, if it is not disbursed, will carry forward and be counted as an asset under the rules of the SSI program.

Transfers

An institutionalized individual who disposes of assets for less than fair market value may be subject to transfer of asset penalties, except in any instance where the State determines the denial of Medicaid would work an undue hardship.

Created Before August 11, 1993 but Changed after That Date

A trust that was created on or before August 11, 1993 but added to, or otherwise augmented after that date, is treated under the above policies. However, additions to such a trust may be considered transfers of assets for less than fair market value.

MEDICAID (MA) TRUSTS

Criteria

The following policies apply to trusts or similar legal devises that were created on or after August 11, 1993.

- The trust was established by the individual, his spouse, someone else (including a court or administrative body) with legal authority to act in place of, or on behalf of, the person or the person's spouse, or someone else (including a court or administrative body) acting at the direction of, or upon the request of, the person or the person's spouse.
- The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine Medicaid eligibility, a Post-eligibility Patient-Pay Amount (PPA), a divestment penalty, or an initial assessment amount. The person's resources include his spouse's resources.
- The trust was not established by a will, nor is it a Special Needs Trust or a Pooled Trust.

Grantor or Settlor

Any of the following may create a Medicaid Trust:

- The individual,
- The individual's spouse,
- A person, including a court or administrative body, with legal authority to act in place of, or on behalf of, the individual or the individual's spouse, or
- A person, including a court or administrative body, acting at the direction, or upon the request, of the individual, or the individual's spouse.

Countable Assets and Income

In general,

- Payments actually made to the individual are treated as income to the individual.
- Amounts that could be paid to the individual, but are not, are treated as available resources.

- Amounts that could be paid to the individual, but are paid to someone else, are treated as transfers of assets for less than fair market value (FMV).
- Amounts that cannot, in any way, be paid to the individual are also treated as transfers of assets for less than fair market value (FMV).

Multiple Contributors

When a trust principal includes assets of another person or persons, as well as the assets of the beneficiary, trust policies apply only to the portion of the trust attributable to the assets of the individual. In determining income and assets in the trust for eligibility purposes, any amounts of income and resources must be based on the proration of the individual's assets in the trust to those of other persons.

Treatment of Trusts

How a trust is treated depends to some extent on what type of trust it is and what countable assets and income can be used.

- **Revocable** - The principal is counted as an available resource to the individual; payments from the trust to, or for the benefit of, the individual are counted as unearned income to the individual; and any other payments from the trust that are not made to, or for the benefit of, the individual are considered assets disposed of for less than fair market value (FMV).

  Exceptions:

  - ➢ The countable amount is reduced when there are multiple contributors.
  - ➢ The amount is not counted if it creates undue hardship.
  - ➢ The modification allowed does not permit distribution of the principal (or his share when there are multiple contributors) to the person.

- **Irrevocable** - If there are any circumstances under which payment from the trust could be made to the individual from all or a portion of the trust, the following rules apply to that portion:

  - ➢ Payment from income or from the principal made to the individual is treated as unearned income to the individual.
  - ➢ Income of the trust that could be paid to the individual is treated as an asset available to the individual.
  - ➢ The portion of the principal that could be paid to the individual is treated as an asset available to the individual.
  - ➢ Payments from income or from the principal that are made, but not to the individual, are treated as a transfer of assets for less than fair market value.
  - ➢ When payments from all, or a portion of, the trust cannot, under any circumstances, be made to the individual, all, or any such portion of income is treated as a transfer of assets for less than fair market value.

Transfer of Assets

For an institutionalized individual, the home is not considered an excluded asset. Placement of the home of an institutionalized individual in a trust results in the home becoming a countable asset.

Transferring an excluded asset (either income or an asset, with the exception of the home of an institutionalized individual) for less than fair market value does not result in a penalty under the transfer provisions because the excluded asset is not an asset for transfer purposes. In addition, placement of an excluded asset in a trust does not change the excluded nature of that asset. It remains excluded.

Transferring a nonexcluded asset to a trust results in a transfer of assets for less than fair market value. Thus the individual may be subject to transfer of asset penalties, except in any instance where the State determines the denial of Medicaid would work an undue hardship.

MILLER TRUST (OR QUALIFYING INCOME TRUST)

The Miller Trust is a trust composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust). The Miller Trust is not recognized in Michigan.

POOLED TRUSTS

Criteria

A trust made up of pooled funds and:

- Established by a disabled individual (as defined by Medicaid), parent, grandparent, guardian, or court for the disabled individual, using the individual's own funds.
- Uses the resources of the disabled person.
- Established and managed by a nonprofit association.
- Is maintained as a separate account for each beneficiary. (For purposes of investment and management of funds, the trust pools the funds.)

The individual, his parent, grandparent, legal guardian, or court establishes accounts in the trust solely for the benefit of the disabled person. The trust must ensure that none of the principal or income attributable to a person's account can be used for someone else during the person's lifetime, except for Trustee Fees.

The trust is not available to the individual. Any payment received from the trust is treated as the person's unearned income.

Multiple Contributors

When someone other than the person or the person's spouse has contributed to the principal of a trust, an amount proportional to that other person's contribution is not counted as assets or transferred assets.

State's Benefit

Pooled trusts have a requirement that, upon the death of the individual, any funds remaining in the trust go to the State agency, up to the amount paid in Medicaid benefits on the individual's behalf.

When an individual has resided in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid. Distribution is based on the State's proportionate share of the total amount of Medicaid benefits paid by all the States on the individual's behalf.

Transfer of Assets

Assets and income transferred into a pooled trust are part of the trust for the entire month.

SPECIAL NEEDS TRUSTS

Criteria

A trust containing the assets of an individual under age 65 who is disabled (as defined by Medicaid) and that is established for the sole benefit of the person by a parent, grandparent, legal guardian, or a court is considered a special needs trust. The trust may contain, in addition to the assets of the individual, the assets of individuals other than the disabled person.

The trust is not available to the individual. Any payment received from the trust is treated as the person's unearned income.

Continuation of Trust After Age 65

When the person becomes age 65, the trust can continue; however, it cannot be added to or otherwise augmented after the person reaches age 65. Any such additions or augmentations after age 65 are not exempt as a special needs trust.

State's Benefit

Special needs trusts have a requirement that, upon the death of the individual, any funds remaining in the trust go to the State agency, up to the amount paid in Medicaid benefits on the individual's behalf.

When an individual has resided in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid. Distribution is based on the State's proportionate share of the total amount of Medicaid benefits paid by all the States on the individual's behalf.

Resources

If these trusts are irrevocable, resources are not counted beginning the month they are placed in the trust.

Transfer of Assets

Resources are subject to the imposition of a penalty under transfer of asset rules unless the transfer is specifically exempt from penalty or is used to benefit the individual and the trust purchases items and services for the person at fair market value.

Assets and income transferred into a special needs trust are part of the trust for the entire month.

UNDUE HARDSHIP

Medicaid Qualifying Trusts or Medicaid Trusts

Undue hardship exists when application of the trust provisions would deprive the person of:

- Medical care; such that his health or life would be endangered. A beneficiary's physician (MD or DO) must document that:
  - Necessary medical care is not being provided, and
  - The beneficiary needs treatment for an emergency condition.
- Food, clothing, shelter, or other necessities of life.

Undue hardship does not exist when:

- Application of the transfer of assets provisions merely causes the person inconvenience.
- It might restrict his lifestyle but would not put him at risk or serious deprivation.

Payments actually made by a trustee to, or on behalf of, the beneficiary do not create an undue hardship.

DEFINITIONS

Annuity

A written contract, usually with an insurance company, establishing a right to receive specified, periodic payments for life or for a term of years. They are usually designed to be a source of retirement income. Only certain types of annuities are excluded as resources. (Refer to "Transfers to an Annuity" in this section.)

Beneficiary

Any individual(s) designated in the trust instrument as benefiting in some way from the trust, excluding the trustee or any other individual whose benefit consists only of reasonable fees or payments for managing or administering the trust. The beneficiary can be the grantor himself, another individual(s), or a combination of any of these individuals.

Fair Market Value (FMV)

An estimate of the prevailing price of an asset if sold at the time it was actually transferred based on criteria used in appraising the value of other assets used in determining Medicaid eligibility.

Grantor or Settlor

Any individual who creates a trust. It includes anyone who furnishes real or personal property for the creation of the trust.

Institutionalized Individual

An individual who is an inpatient in a nursing facility or other medical institution and with respect to whom payment is made based upon a level of care (LOC) provided in a nursing facility. This also applies to an individual who is a home and community-based services waiver beneficiary.

Irrevocable Trust

A trust that cannot, in any way, be revoked by the grantor, court, trustee, or any other person or entity.

Legal Instrument or Device Similar to Trust

Any legal instrument, device, or arrangement that may not be called a trust under State law, but which is similar to a trust. It involves a grantor who transfers property to an individual or entity with fiduciary obligations. The grantor makes the transfer with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include escrow accounts, investment accounts, pension funds, or other similar devices managed by an individual or entity with fiduciary obligations.

Modifying

Changing the beneficiary or the availability of the principal or income.

Payment

Any disbursal from the principal or income of the trust that benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursement, such as the right to use and occupy real property.

Personal Property

Any item subject to ownership that is not real property. This includes currency, savings accounts, and vehicles.

Principal

The assets in the trust. The assets may be real property or personal property.

Real Property

Land and objects affixed to the land such as buildings, trees, and fences. Condominiums are real property.

Resources

All income and assets of a person and the person's spouse. It includes any income and assets the person or spouse is entitled to but does not receive because of action:

- By the person or spouse,
- By someone else (including a court or administrative body) with legal authority to act in place of, or on behalf of, the person or spouse, or
- By someone else (including a court or administrative body) acting at the direction of, or upon the request of, the person or spouse.

Revocable Trust

A trust that can, under State law, be revoked or modified by the grantor, court, the trustee, or any other person or entity.

This includes a trust that allows for revocation, or modification only when a change occurs such as the grantor leaves the LTC facility or the beneficiary becomes competent.

Trust

Any arrangement in which a grantor transfers property to a trustee or trustees with the intention that it be held, managed, or administered by the trustee(s) for the benefit of the grantor or certain designated individuals. The trust must be valid under State law and manifested by a valid trust instrument or agreement. This includes any legal instrument or devise that is similar to a trust.

Trustee

The person who has legal title to the assets and income of a trust and the duty to manage the trust for the benefit of the beneficiary.

TRANSFERS TO AN ANNUITY

The purchase of an annuity is considered a transfer for less than fair market value unless:

- The annuity is commercially issued by an agent licensed in the State of Michigan, and
- The annuity is irrevocable, and
- The annuity returns the principal and interest within the purchaser’s life expectancy, and
- The annuity payments must be equal monthly payments starting with the first payment and continue for the term of the payout (i.e., no balloon or lump sum payments), and
- The State of Michigan receives all amounts remaining in the annuity upon the death of the individual up to the amount equal to the total medical assistance paid on behalf of the individual by the Medicaid program.

Divestment penalties may apply to the purchase of any annuity not meeting the conditions listed above. Consider any annuity purchased after the individual’s retirement from employment to be solely for the purpose of establishing eligibility for Medicaid.